FILED
MAR 4 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1921

No. 153.

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit

---

BRIEF FOR APPELLEE

HUGH L. BOND, JR.,
R. V. FLETCHER,
W. S. BRONSON,
A. G. GUTHEIM,
Counsel.

J. H. Furst Company, Printers and Publishers, Baltimore.

INDEX

	PAGE
STATEMENT	1-19
The Bill of Complaint involves principally construction of the Interstate Commerce Act	2
Removal of Cause to U. S. District Court	2
Answer shows that question is one of administration originally within jurisdiction of Interstate Commerce Commission, that rules complained of having been established by direction of Commission and attack thereon could only be heard by three judges	2
Injunction against continued enforcement of rules granted by single judge, and requiring an absolutely proportionate distribution of all cars to mines	2
Appeal and proceedings in Circuit Court of Appeals, injunction reversed and bill ordered dismissed	3
Summary of questions raised by specification of errors	4
Controversy involves present legal status of Interstate Commerce Commission's "assigned car rule" of car distribution to coal mines	6
Scheme of car distribution to coal mines	6-8
Distinction always recognized between "assigned" and "non-assigned" cars	8
Transportation of railroad fuel coal	9
History of the assigned car rule as developed in reports of the Interstate Commerce Commission and decision of courts	9-14
Explanation to U. S. Senate of the assigned car rule and its then present effectiveness, and reasons therefor, by the Interstate Commerce Commission in 1920	14-15
Ultimate development of the assigned car rule	15
Pre-war effectiveness of the assigned car rule	15-16
Changes in assigned car rule in 1918 removing railroad fuel cars therefrom as an incident of coal control by Fuel Administration, and guarantee by latter of railroad fuel requirements; also continuance of rule for private cars	16

PAGE

Confiscation of coal for railroad fuel use made imperative by lack of assigned cars after return of railroads to corporate control in 1920 17

Evils of confiscation of coal for railroad fuel use 17

Necessity of railroads for fuel coal 17

Abolishment of assigned car rule does not make any more cars available for commercial coal loading 17-18

Recommendation of Interstate Commerce Commission March 2, 1920, that uniform coal car distribution rules of Railroad Administration be maintained in effect by railroad corporations 18

Resulting depletion of railroad fuel coal because of lack of assigned cars, and confiscation necessary 18-19

Contemporaneous attempt of coal operators to enjoin use of assigned cars and to enjoin confiscation 19

Interstate Commerce Commission's reinstatement of railroad fuel cars in assigned car rule 19

ARGUMENT 20-60

Bill attacked order of Commission, and could therefore be heard only by three judges; or 20

Bill raised an administrative question solely within jurisdiction of Interstate Commerce Commission 21

Paragraph 12 of Section 1, Interstate Commerce Act is a statutory enactment of the Interstate Commerce Commission's assigned car rule 21

Paragraph 12 itself is not a workable scheme of distributing cars to coal mines 21

Deficiencies of paragraph 12 as a scheme of distribution of cars to coal mines 21-22

Appellant's interpretation of paragraph 12 goes beyond its language 23

Circuit Court of Appeals' interpretation of paragraph 12 likewise goes beyond its language 24

Chronological review of former assigned car rules condemned by the Interstate Commerce Commission as not resulting in counting assigned cars against mines receiving them 25-27

PAGE

The Interstate Commerce Commission's just and reasonable rule prescribed to supersede the old rules which did not count assigned cars..... 27

Only change in rule in 1918 under the war emergency was to remove the railroad fuel car from under it..... 28

Only effect of Interstate Commerce Commission's emergency direction of April 15, 120 was to reinstate the railroad fuel car in the rule..... 28-29

No dictionary meaning of the vital word of the paragraph which supports appellant's contention respecting interpretation... 29-30

Decision of District Court of Northern District of Alabama, Southern Division, supports contention of this brief..... 30-32

Effect of appellant's interpretation would be confiscation of private car owner's rights in his own private cars..... 32-33

Congress in other car service provisions of Interstate Commerce Act, expressly saved private car owner's rights in his own cars 33

No compensation provided in the Act for the taking of private cars from the owner..... 34

Congress expressly rejected proposed language clearly calculated to abolish the rights of a private car owner in his own car.. 34

Legislative history of paragraph 12..... 35

Originally proposed bill contained language explicitly accomplishing all that appellant contends is accomplished by the existing law finally enacted..... 35-40

Interstate Commerce Commission recommended to House Committee statutory enactment of Commission's assigned car rule..... 40-41

The language proposed to abolish the assigned car rule, after consideration by the Conference Committee of the Senate and House, was expressly rejected..... 41-42

Original form Transportation Act, 1920 of amendment proposed to abolish assigned car rule conclusive against contention of appellant 42

Conference Committee's report on bill showing intention to enact assigned car rule..... 43-44

Interstate Commerce Commission has expressed view that statute in paragraph 12 enacts its assigned car rule..... 45-46

PAGE

Relation of the commodities clause to the controversy..... 46

Private character of the service of transporting railroad fuel.... 46-48

Emergency powers of Interstate Commerce Commission under paragraph 15, Section 1, Interstate Commerce Act authorize suspension of car distribution rules established pursuant to paragraph 12 48-49

This authority is specifically found in sub-divisions (a) and (b) of paragraph 15..... 49-50

Original car service provisions of Act adopted in 1917 cited to show extent of Commission's powers..... 51-52

Meaning of phrase "car distribution" in railroad practice, regulation, and in the Interstate Commerce Act..... 52

Analogy of paragraph 12 covering car distribution to mines and paragraph 11 covering all car distribution..... 52-53

Paragraph 15 must be read in the nature of a proviso to all the other paragraphs of the first section respecting car service 53-54

The power conferred in paragraph 15 is a valid delegation of administrative power and not a delegation of legislative authority 54-56

Necessity of flexibility of judgment in regulation of service..... 56-57

The Interstate Commerce Commission's car service direction of April 15, 1920 a valid exercise of the power reposed in the Commission under paragraph 15..... 57-58

The Commission is the judge of what constitutes the emergency authorizing the exercise of the power..... 58-59

LIST OF CASES CITED

	PAGE
Atlantic Coast Line v. N. Car. Corp. Comm., 206 U. S. 1-26	56
Assignments of Freight Cars, 57 I. C. C. 760	41, 43
B. & M. Rd. v. Hooker, 233 U. S. 97	46
Church of the Holy Trinity v. U. S. 143 U. S. 457	35
Corona Coal Co. v. Southern Ry. Co., 266 Fed. Rep. 726	17, 30
District Court Jurisdiction Act, Oct. 22, 1913, Compiled Stat., Sec. 998	2, 4
Field v. Clark, 143 U. S., 649	54, 56
Hillsdale Coal & Coke Co., v. P. R. R. Co., 19 I. C. C. 356	8, 12
Irregularities in Mine Ratings, 25 I. C. C. 286	8
Interstate Comm. Comm. v. C. & Alton R. R., 215 U. S. 479	21
Interstate Com. Com. v. Ill. Cent. R. R. Co., 215 U. S. 453	12, 21
Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43	21
Louis. & Nash. R. R. v. Cook Brewing Co., 223 U. S. 70	21
New Haven R. R. v. Interstate Com. Com., 200 U. S. 361	46
Penna. R. R. Co. v. International Coal Mining Co., 230 U. S. 184	42
Powhatan Coal & Coke Co. v. N. & W. Ry. Co. et al., 13 I. C. C. 69	8
Railroad-Telegraph Contracts, 12 I. C. C. 10	47
Regulations Restricting the Dimensions of Baggage, 26 I. C. C. 292	23
Railroad Com. of Ohio et al. v. H. V. Ry. Co., 12 I. C. C. 398	8, 10, 11
Royal Coal & Coke Co. et al. v. Southern Ry. Co., 13 I. C. C. 440	8, 11
Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86	8, 12
Santa Fe Railway v. Grant Bros., 228 U. S. 177	47
Traer v. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451	8, 10
Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426	21
United States v. Ohio Oil Co., 234 U. S. 548	47

IN THE

Supreme Court of the United States

October Term, 1921

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellee.

No. 153.

STATEMENT.

Lambert Run Coal Company, a West Virginia corporation, filed against the Baltimore and Ohio Railroad Company, a Maryland corporation, in the Circuit Court of Marion County, West Virginia, (Rec. 5) a bill in chancery which prayed that the defendant railroad be enjoined, during any period of shortage of coal cars, (Rec. 23) "from distributing to any of the mines served by it more cars than the said mines are entitled to under the maintenance and application of their respective mine ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine," and also from continuing the enforcement of its coal car distribution rules 8, 9, and 10 (Rec. 34). Upon

petition of the Railroad Company (Rec. 37) alleging, among other things, diverse citizenship and principally that the bill involved the construction of certain laws of the United States, particularly the Act to Regulate Commerce, approved February 4, 1887, as amended, and more especially the amendments thereto of the Transportation Act, 1920, (Rec. 38-39) the bill was removed to the District Court of the United States for the Northern District of West Virginia (Rec. 54). The Railroad Company then filed a Motion to Dismiss and Answer (Rec. 84) setting up as its principal reasons why the bill should be dismissed (1) that the Coal Company had not stated the most material facts necessary to a determination of the case, (2) that no action would lie until the matter had been passed upon by the Interstate Commerce Commission, and, (3) that the parts of the Rules complained of were made under the direction of the Commission's emergency order of April 15, 1920, issued by virtue of the power conferred on the Commission by paragraph 15 of Section 1 of the Interstate Commerce Act, and did not contravene Paragraph (12), of Section 1, of the Act.

The case was heard on motion for an injunction by one District Judge, the defendant's objection that it could be heard only by three judges, one of whom should be a circuit judge, under the District Court Jurisdiction Act, being overruled, and an order was issued (Rec. 107) enjoining the defendant Railroad Company from adopting or enforcing any distribution of cars to mines for the transportation of coal in an amount the ratio of which to the rated capacity of the mines "is greater or less than or different from the ratio of the total number of cars available on defendant's line for the transporta-

tion of coal to the total rated capacity of all mines served by defendants." (Rec. 100).

From this injunction order an appeal was taken (Rec. 110) to the Circuit Court of Appeals for the Fourth Circuit by the Railroad Company, there being thirty-seven assignments of error. Principally the errors assigned were:—first, that the District Court erred in hearing and determining the application for an injunction in the absence of three judges, of whom at least one should be a Circuit Judge, and in not holding that the cause was one brought to enjoin, set aside, annul, or suspend in whole or in part, an order of the Interstate Commerce Commission; and second, that the District Court erred in not holding that the practice sought to be enjoined was expressly authorized by a certain order of the Interstate Commerce Commission made April 15, 1920, and which said order, it was contended, was and is within the jurisdiction and authority of said Commission under and by virtue of paragraphs Nos. (10), (11), (12), (13), (14), (15), (16), and (17) of Section 1 of the Interstate Commerce Act (Rec. 111-113). This latter contention the Circuit Court of Appeals sustained, (Rec. 129-130) and entered a decree dissolving the injunction and dismissing the bill, (Rec. 131) but specifically holding, nevertheless, that the practices complained of "are not in accord with sub-division (12) of the Transportation Act of 1920, standing alone." (Rec. 128). The Court also undertook to define what constitutes an 'emergency,' as that word is used in paragraph 15 of Section 1 of the Interstate Commerce Act, to the effect that it was a car shortage so much beyond the usual as to constitute an emergency, and not merely "the usual long existing car shortage." (Rec. 129). The Court further said that the

injunction was improperly granted because the Court did not call to its assistance two other judges, as required by the District Court Jurisdiction Act.

The proceeding now comes before this Honorable Court on the appeal of Lambert Run Coal Company (Rec. 132) which assigns eleven errors on the part of the Circuit Court of Appeals, (Rec. 133) all of which may be summarized as raising the following questions:

1. Is the cause one originally brought to enjoin an order of the Interstate Commerce Commission, and therefore one wherein the injunction was improperly granted because the District Court did not call to its assistance two other judges, in accordance with the District Court Jurisdiction Act?

2. Was it the intent of Congress in enacting paragraph No. (12) of Section 1 of the Interstate Commerce Act to make the "assigned car rule" of the Interstate Commerce Commission, a rule of statute?

3. Does paragraph No. (15) of Section 1 of the Interstate Commerce Act vest in the Interstate Commerce Commission the power to suspend the operation of coal car distribution rules established in pursuance of said paragraph No. (12) whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country?

4. Was a certain order made by the Interstate Commerce Commission April 15, 1920 a valid exercise of the authority conferred upon it by said paragraph No. (15) of the Interstate Commerce Act, and was such order reviewable by the Court?

The pertinent portions of the Interstate Commerce Act, the Interstate Commerce Commission's notice of March 2, 1920, relative to coal car distribution, and the order of the Commission, dated April 15, 1920, are set out in the margin below: *

* Interstate Commerce Act, Section 1.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing or a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such times as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify,

This entire controversy involves the present legal status of what is commonly known in the regulation of interstate commerce as the "assigned car rule,"—a rule originally laid down by the Interstate Commerce Commission in 1907 to govern certain phases of the distribution of cars to mines for loading with coal.

Car Distribution to Coal Mines:—Car distribution rules are obviously a simple matter when the railroad has more than enough cars to meet all requirements of

change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Interstate Commerce Commission Notice to Carriers and Shippers, March 2, 1920. (Rec. 106).

"The supply of cars available for the transportation of coal is insufficient to meet the demand. Unusual movements incident upon the strike of coal miners has brought about an abnormal location of cars. It is desirable that the proper relocation of cars shall be brought about as rapidly and with as little confusion as is possible. Critical situations still exist in which fuel for essential industries and purposes must be provided. The railroads and the coal operators have all been working under the uniform mine rating and car distribution rules established by the Railroad Administration and those rules seem to be generally satisfactory and to meet with general approval.

To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

GEORGE B. McGINTY, *Secretary.*"

Interstate Commerce Commission Notice to Carriers and Shippers, April 15, 1920. (Rec. 105.)

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in

its shippers. When, however, there is a general car shortage, there must be some equitable basis or system upon which such equipment as is available is divided between shippers, and with respect to bituminous coal mines as a class of shippers, the rules governing during the pendency of this controversy are set out in the record at pages 27-34. Briefly, under these rules an hourly capacity for producing coal is determined from the previous month's performance; this, in tons, is translated into daily capacity by multiplying by the established number of hours in the working day; and this product, divided by 50 as the capacity of the accepted standard coal car gives, in cars, the basic figure denominated the "daily rating" or the "rated capacity," of the mine. This ascertained in identical manner for all mines, then

order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Tracr* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. McGINTY,
Secretary.

becomes the basis of car distribution to such mines in car shortage, or what are sometimes termed percentage periods.

The present day uniform scheme of mine rating and car distribution is an evolution of some years. It had its culmination during the war period when it received the attention of the Fuel and Railroad Administrations, and was published as a uniform arrangement by the latter (Rec. 47-48). Its previous history is to be found in numerous reports of the Interstate Commerce Commission, of which particular reference may be made to:

R. R. Com. of Ohio et al. v. *H. V. Ry. Co.*, 12 I. C. C. 398.

Powhatan Coal & Coke Co. v. *N. & W. Ry. Co. et al.*, 13 I. C. C. 69.

Royal Coal & Coke Co. et al., v. *Southern Ry. Co.* 13 I. C. C. 440.

Traer v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C. 451.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. 86.

Hillsdale Coal & Coke Co. v. *P. R. R. Co.*, 19 I. C. C. 356.

In re Irregularities in Mine Ratings, 25 I. C. C. 286.

In all the rules of the carriers, in these various reports of the Commission, and in the uniform rules set out in the record at pages 27-35, there is a distinction recognized between assigned and non-assigned cars in the distribution scheme. In the former class there have always been included the cars of private ownership, and the cars of railroad ownership assigned or consigned to

certain mines for the loading of railroad fuel coal of the owning railroad. There are some roads which obtain all their fuel coal from mines located on their own rails. Others obtain part from such local mines, and the balance from mines located on foreign rails. There are some of the more important roads in the country, those of New England being a group of this class, all of whose fuel coal must come from mines located on other railroads, there being no coal tributary to their own lines. While most of the fuel coal moving to non-coal-producing railroads moves all-rail, there is considerable that moves rail-and-ocean and rail-and-lake.

Railroads secure their fuel coal supplies under varying methods. In some cases roads own and operate the mines from which a considerable proportion of their fuel coal is obtained, and in other instances their operation of mines is under lease. Again, some roads purchase the entire output of certain mines, and in other cases only a portion of the output. (Rec. 97-98). Bearing in mind the changing conditions of transportation and coal mining, particularly as affected by the making of new contracts for railway fuel supply year after year, it seems highly desirable that the regulating body should have a margin of flexibility and safety in dealing with the roads and the shippers of this important tonnage commodity.

History of the Assigned Car Rule:—Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars, and cars for the carrier's own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such

cars against the distributive shares of the mines to which they were given (Rec. 96). Few of the roads then counted against the mine ratings, and against the mine's distributive share of empty cars, company fuel cars (i. e. cars to be loaded with the carrier's own fuel), private cars (i. e. cars owned or leased by coal companies), or foreign consigned cars (i. e. cars delivered by foreign roads for loading their own fuel coal at particular mines). (Rec. 99). All such cars were given to the mines for which they were intended and such mines were given in addition their full share of the other cars available for distribution (Rec. 96). This practice was complained of as unreasonable and unduly prejudicial, and in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra* decided July 11, 1907, the Commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the mine to which given it should be given additional cars only sufficient to make up its distributive share. (Rec. 96). In *Traer* v. *Chicago & Alton R. R. Co., et al., supra* decided April 13, 1908, the same questions were presented that had been presented in *R. R. Com. of Ohio, et al.* v. *H. V. Ry. Co., supra,* and the additional question of the reasonableness of the carrier's failing to count against the mine to which they were delivered cars for loading with its own railroad fuel. The Commission fol-

lowed the decision in *R. R. Com. of Ohio, et al.* v. *H. V. Ry. Co., supra,* and in addition, held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from which such fuel supply is received, but that if such mine or mines also ship commercial coal, the fuel cars so supplied must be counted against the mine or mines under the rule laid down in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra.* (Rec. 97).

The same general question came before the Interstate Commerce Commission in a number of other cases within the next few years, and the rule originally laid down was invariably followed. Thus, in *Royal Coal & Coke Co., et al.* v. *Southern Ry. Co., supra,* at page 448, the Commission said:

> "The carrier must be free to contract for the total output of a mine, if it so desires; or it may contract for any part of a mine's output less than the whole, and it is entitled to get its fuel coal first, for without fuel it can not haul even commercial coal to its destination, to say nothing of complying with its obligations to the public at large; but in all its acts it must deal even handed justice in the matter of car distribution as in the matter of rates. If a mine contracts to furnish only a part of its output to the railroad for fuel, and if the filling of its contract with the railroad calls for its full pro rata of cars, or more, then it should not receive other cars for commercial shipments. If such a mine in filling its contract to supply fuel coal to the railroad does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars."

Again, shortly thereafter, in further consideration of the same problem in *Rail & River Coal Co.* v. *B. & O. R. R. Co., supra,* the Commission, discussing *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra,* at page 92, said:

> "The principle clearly announced in the case referred to, both with respect to the so-called private cars and the so-called foreign railway fuel cars, is that while a carrier, during percentage periods, may not assign the private cars to operators other than their owners, and may not assign foreign railway fuel cars to any mines except those to which they have been manifested by the foreign line, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belong or the foreign railway fuel cars have been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine do not fill out its distributive share of available cars, enough system cars are to be added to make up its share according to its rating."

In *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.,* 215 U. S. 453, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commission in *R. R. Com. of Ohio, et al.* v. *H. V. Ry. Co., supra,* and in *Traer* v. *Chicago & Atlon Railroad Co, supra,* and held that the act to regulate commerce delegated to the Commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means of prohibiting undue preference and unjust discriminations (Rec. 98). Following this decision by this Honorable Court, the Commission in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co., supra,* reaffirmed its assigned

car rule as a just and reasonable rule, saying at pages 357-358:

> "The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio* v. *H. V. Ry. Co.*, 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned, and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars."

Again, in the same case, at page 364, it was said:—

> "We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line

> also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced, *Interstate Com. Com.* v. *Ill. Cent. R. R. Co., supra,* the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds."

And, answering the contention of the railroad that its own more liberal rule was necessary to protect private car owners' rights, the Commission further said at page 370:

> ". . . in none of its decisions relating to coal car distribution has the Commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of the carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators."

Explaining, in answer to a Resolution of the United States Senate in 1920, why this assigned car rule was then still effective (Rec. 97), the Commission said:

> ". . . if a contract for fuel covers such supply

> as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel even though it thereby deprived shippers of desired use thereof: that this right to so use its cars did not rest upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor consideration of public policy which recognize the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and public."

Thus it will be seen that the rule so established by the Interstate Commerce Commission and sustained by this Honorable Court, expressly provided that all assigned cars, whether cars for company fuel loading, cars for foreign railway fuel loading, or privately owned or leased cars, must be placed in accordance with the assignment or consignment at the mines to which assigned or consigned, even though in excess of the distributive share of cars to which such mines were entitled; provided, however, that such cars must be counted against the distributive share of the mine receiving them, and that where the cars so placed equalled or exceeded the distributive share to which the mine was entitled on that day, no unassigned cars should be placed at the mine in addition to the assigned cars; but, that where the assigned cars placed at the mine did not equal the number of cars to which the mine was entitled as its distributive share for the day sufficient unassigned cars should be placed at the mine to make the total placements for that day equal to its distributive share. (See Rec. 11, Paragraph 7).

The rule of law on this subject which had by 1910 thus

been established remained the controlling rule for carriers generally, and apparently without friction or controversy for many years. During the world war, and under the rules of the Fuel Administration, including its bituminous coal zoning system, and while the roads were under Federal control, the use of assigned cars for loading railroad fuel was abandoned (Rec. 100). This arrangement was an incident of the war-time control of fuel and mine labor exercised by the President through the Fuel Administration (Rec. 12-13). The rule, however, remained in effect, and throughout the period of Federal control of railroads private cars were placed for loading in accordance therewith on an assigned basis. At the same time that the assignment of cars for railroad fuel loading was abandoned, the government price of bituminous coal was reduced ten cents per ton in all districts throughout the United States (Rec. 12), and arrangements were made by the Fuel Administration and the Railroad Administration whereby requisite supplies of fuel coal were guaranteed by the Fuel Administration to the railroads without the assignment of cars for that particular loading. This understanding and arrangement was embodied in advices given to the railroads of the change in practice July 1, 1918, to the roads in the east, and July 6, 1918, to the roads in the south and west, the Fuel Administration in each instance being advised that the former practice had been abandoned and the new arrangement instituted. (Rec. 13-17).

The particular point to be noted in connection with this war-time abandonment of the assigned car rule for railroad fuel cars is that the rule was not even to this partial extent abandoned until, more than a month after the original understanding between the Fuel and Railroad Administrations, definite and positive arrange-

ments were made whereby the railroads were guaranteed their requisite fuel supplies by the Fuel Administration. That guarantee rested upon the Fuel Administration's control of coal distribution and an explicit understanding between it and the Railroad Administration (Rec. 14-17). It was after the Fuel Administration had ceased to function and its guarantees were accordingly no longer effective, that the railroads, still under Federal control, and abiding by the decree of the President abolishing assigned cars for railroad fuel (Rec. 12-13) were compelled to resort to confiscation of coal in transit in order to keep their roads in operation (Rec. 100). In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel (Rec. 100). For an elucidation of the reasons supporting this view as to the undesirability of confiscation, reference may be had to *Corona Coal Co.* v. *Southern Ry. Co.,* 266 Fed. Rep. 726 at 727-728.

According to the United States Geological Survey the steam railroads of the United States consume between 27 and 28 per cent of this country's annual production of bituminous coal. Regardless of how this coal is loaded,—whether in assigned or non-assigned cars,—that amount is required and must be had currently, the year round. At least the same number of cars will be needed for its transportation on a non-assigned basis as on an assigned basis, and the loss of concentrated handling and effort in the use of non-assigned cars at a larger number of loading mines may well require more cars. In any event, the use of non-assigned cars for railroad fuel coal will not make *even one* more car avail-

able for ordinary commercial coal, and obviously the latter will fail of transportation if the railroad's requirements are not currently furnished. This contingency the assigned car prevents; without the assigned car and with no power existing to compel shipment on railroad contracts, there is but one avenue open to the carrier when voluntary shipments fail in a high market, car shortage period,—confiscation, with its attendant evils above referred to. For the railroads must run. Other vital industry may, if it deems it wise, protect its needs with private cars as is later on shown (*post*, p. 32-33) but if the railroad's assigned car is not the railroad's private car, then the railroad, most vital of all industry, has no protection for its fuel coal supply. This is the true interest of the public in this proceeding.

When federal control of railroads terminated on February 29, 1920, there was in effect on all railroads under federal control the uniform coal car distribution rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association. In order that there might not be confusion because of different lines of action being followed by different individual roads, the Interstate Commerce Commission on March 2, 1920, issued a notice to carriers and shippers (*ante*, p. 6) recommending that until experience and study demonstrated that other rules would be more effective and beneficial, the uniform rules as contained in Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect. (Rec. 100).

This action of the Interstate Commerce Commission was taken the day after the Transportation Act, 1920, became effective. At this time some railroads which did not have more than two or three days' supply of coal,

and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mine were being sued for damages on account of such confiscation. Injunctions were being sought in State courts against the practice of confiscation, and when it was learned that the carriers were contemplating return to the use of assigned cars, injunctions were sought in the State courts againts the same carriers restraining them from using assigned cars. Numerous informal conferences were had between the Commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carriers could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A conference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestion to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply (Rec. 100-101).

It was only after these various endeavors had failed to meet the situation that the Interstate Commerce Commission issued its order of April 15, 1920, already set out (*ante*, p. 6). The effect of this order was to reinstate the railroad fuel car in its place in the assigned car rule which had remained in effect and continued to govern private coal car distribution during Federal control. This was the situation, therefore, that resulted in the commencement of the proceedings that have now come before this Honorable Court.

ARGUMENT.

1. The original bill of complaint attacked a rule established by the Interstate Commerce Commission's direction of April 15, 1920, which was mandatory upon the carriers, and as such was in the nature of an order of the Commission, and therefore could be enjoined only by three judges, one of them a Circuit Judge, after notice to the Commission and to the Attorney General; or, as the only alternative, the bill attacked the reasonableness of a carrier's rule of car distribution to coal mines, and, thus raised an administrative question, original jurisdiction of which is solely within the Commission.

The correctness of this proposition is conceded by the Circuit Court of Appeals (Rec. 130). The direction, was to be sure, embodied in a "Notice to Carriers and Shippers," but its mandate is clear in the language reading:

> "The Commission * * * hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission."

Clearly the issue of such a direction is within the emergency power of the fifteenth paragraph of the first section, and when issued its effect, so far as the carrier is concerned, is identical with the effect of an order. There would therefore appear to be no room in our scheme of interstate commerce regulation, for any distinction between a direction and an order of the Commission in any consideration of the effect thereon of the District Court Jurisdiction Act of October 22, 1913, Compiled Statutes, Section 998.

If, however, the Commission's direction, embodied in the notice of April 15, 1920, can not be regarded as an order of the Commission, then, it is respectfully submitted the cause was not properly justiciable by either the single District Judge or by three judges. For the issue would then be the reasonableness of the defendant railroad's rule, and this, as an administrative question, would be exclusively one for the Commission. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223, U. S. 70; *Loomis* v. *L. V. R. R. Co.*, 240 U. S. 43.

2. Paragraph No. (12) of Section 1 of the Interstate Commerce Act is a statutory declaration of the just and reasonable rule of coal car distribution originally laid down by the Interstate Commerce Commission in *Traer* v. *Chicago & Alton R. R. Co., et al.*, 13 I. C. C. 451, and *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and not found objectionable either on legal or constitutional grounds in *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452 and *Interstate Comm. Comm.* v. *C. & C. R. R.*, 215 U. S. 479.

Paragraph 12 of Section 1 is not, *per se*, a complete and workable scheme sufficient of itself to govern the distribution of cars to coal mines. It is far from it, and the mere requirement that mines shall be rated and that each and every car furnished shall be counted against the mine, does not cure the deficiency. To realize this one need only understand a small part of the difficulties of a car shortage situation, and peruse the distribution rules of the carriers in respect thereto. These are set out in full at pages 27 to 34 of the record.

Under these rules provision is made for a multitude of special conditions not in any way met by the twelfth

paragraph of Section 1. The latter speaks of cars as a physical unit; the carriers' rules avoid the inequality of this by specifying the 50-ton car as a unit, and calculating others accordingly (Rec. 33, rule 5). The statute speaks of mines in the abstract; the rules carefully distinguish between established and developing mines, recognizing the necessity of the latter for special attention, —a necessity always admitted by both carriers and mine operators (Rec. 2, rule h). Again, the rules make special provision for changes in rating of mines which supply coke ovens, another necessary incident of the whole business not at all provided for by the statute as the Coal Company construes it (Rec. 28, Rule d). Note also that under the rules all the operators in a mining district may rotate their mines in the enjoyment of such car supply as is available in a period of car shortage (Rec. 31-32, rule 3), but no such provision for obvious economy is permitted under the hard and fast interpretation which the Coal Company puts on paragraph 12. Another point of practical importance is that that hard and fast interpretation fails to recognize the problem of the partly loaded car which stands over until the next day, when the whistle blows the quitting hour. This is covered by rules 6 and 7 (Rec. 33-34). A somewhat similar situation arises as to cars loaded but not billed; these are adequately covered in the rules. (Rec. 31, Preamble). Furthermore, the rules require a periodic squaring of accounts between mines; the silence of paragraph 12 on this point would seemingly, as the Coal Company construes that paragraph, require a day to day balanced performance, an obviously impossible thing in railroad operation and so recognized by the National Coal Association (*post*, p. 38).

The Language of Paragraph 12 alone clearly shows it is intended as a statutory enactment of the Commission's Assigned Car Rule. To those acquainted with the trend of interstate commerce regulation there would seem to be no doubt or ambiguity respecting the intent of the Congress in enacting paragraph (12) of Section 1 of the Interstate Commerce Act. The pertinent language and that which is usually the basis of argument in the requirement on the carrier to "count each and every car furnished to or used by any such mine for transportation of coal against the mine."

It is significant that this particular portion of the statute is embraced in Section 1, the "just and reasonable" section as distinguished from the "anti-discrimination" sections. Paragraph 12 does not say that it shall be the duty of every carrier by railroad to make just and reasonable and non-preferential distribution of cars to coal mines. All reference to discrimination is omitted, although at one time proposed to be included, as hereinafter shown at page 35. And it has long been understood that the law does not prohibit every discrimination, but only that which is undue. *Regulations Restricting the Dimensions of Baggage,* 26 I. C. C. 292, at page 303.

The plaintiff's contentions require that it write into the statute words which will carry the statute beyond the mere requirement of counting the cars, and which would prohibit the carrier from effecting anything other than an exact balance between mines in the ultimate distribution of all cars. If this had been the intent of the Congress, it would undoubtedly have used words calculated to impress upon the carrier the duty of distributing its cars not only justly and reasonably, but also without inequality. This it did not do.

The error into which the plaintiff has fallen is clearly shown in its petition (Rec. 9) where, after reciting the requirements of the law that the carrier count each and every car against the mine, the petition goes on to assert that the plaintiff "is further entitled to the benefit and protection of provisions of said Paragraph 12 of said Section 1 to the end that no other coal mine located on defendant's line shall receive a greater proportionate share of such cars either because of failure of defendant to apply said mine ratings to or count each and every car as aforesaid or for any other cause or reason whatsoever." These words, it is submitted, contend for an evenly balanced distribution of all cars, assigned and non-assigned, not required by the bare language of the statute, that the carrier shall "count" each and every car against the mine.

Strangely enough, the Circuit Court of Appeals, in its decision in this proceeding (Rec. 128) seems to fall into the same error where it says:

> "We cannot doubt that by sub-division 12 of Section 402 the Congress clearly expressed the intention to abolish all preference to mines furnishing railroad fuel coal under the assigned car rule in periods of ordinary car shortage. The count of each and every car required is not a mere independent futile enumeration; but a count of each and every car furnished or used against the mine to the end that there should be a proportional distribution of all available cars resulting in fair and equal opportunity to each mine on the basis of its rating."

This language of the Circuit Court of Appeals, it is respectfully submitted, goes far beyond what the requirement of the statute justifies, and necessarily reads into the Act language which is not there and which, as

will be later shown (*post*, pp. 36 and 42) was specifically excluded. Moreover, the "count" made under and in accordance with the rule of the *Traer* and *Hocking Valley* cases, *supra*, is by no means "a mere independent futile enumeration," as the court below puts it. It is a very potent feature of the application of the rule, its very useful purpose being to ascertain whether the assigned cars are less than or equal or exceed the distributive share to which the mine is entitled of all cars. This ascertained, the ultimate just and reasonable distribution of non-assigned cars becomes possible, and not until then is it possible, for upon this ascertainment depends whether or not the mine receiving assigned cars shall in addition receive any non-assigned cars.

It would seem well at this point to review in chronological order the various assigned car rules which have been effective during the years this controversy has engaged the attention of the Interstate Commerce Commission. The original rule condemned in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra*, was described by the Commission at page 402 of its report in this language:

> "The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:
>
> (a) System cars, which include cars owned by the defendant, or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.
>
> (b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations.

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars were counted in thegeneral distribution the supply of such cars would be cut off or greatly diminished."

In *Traer* v. *Chicago & Alton Railroad Co., et al., supra,* the Commission's recital of the rule condemned was as follows:

> "In establishing a system of car distribution the defendants have given the several mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the system established, each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and private cars are not charged against the distributive shares of the mines to which they are assigned. After the assignment of such cars to said mines, each is given the same percentage of the remaining cars available for distribution that day as if it had received no cars at all."

The distribution plan condemned in *Royal Coal & Coke Co., et al.* v. *Southern Ry. Co., supra,* was briefly stated to be:

> "The tonnage of the cars for defendant's railway fuel supplied to the fuel contract mines was deducted from the rated capacities of such mines

> and the remainder was considered the rating of these mines on which they shared with purely commercial mines in the pro rata distribution of cars available for commercial shipments."

These condemned rules were concrete examples of rules which the Commission considered did not result in counting the assigned cars against the mines receiving them. It was to cure the evil of such rules that the Commission prescribed the just and reasonable rule which required that all assigned cars, whether cars for company fuel loading, cars for foreign railway fuel loading, or privately owned or leased cars, must be placed in accordance with the assignment or consignment at the mines to which assigned or consigned, even though in excess of the distributive share of cars to which such mines were entitled; provided, however, that such cars must be counted against the distributive share of the mine receiving them, and that where the cars so placed equalled or exceeded the distributive share to which the mine was entitled on that day, no unassigned cars should be placed at the mine in addition to the assigned cars; but, that where the assigned cars placed at the mine did not equal the number of cars to which the mine was entitled as its distributive share for the day, sufficient unassigned cars should be placed at the mine to make the total placements for that day equal to its distributive share. (See Rec. 11, Paragraph 7).

This was the rule which, in the words of the Commission, "was not found objectionable either on legal or constitutional grounds" by this Honorable Court in *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452. See *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, *supra*. It was the rule which was maintained in effect thereafter throughout the war period, except that as an

incident of war time fuel control, as already pointed out (*ante,* p. 16), the railroad fuel car was taken out from under it in 1918. Observe that with this change the rule read (Rec. 48-49):

> "8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.
>
> "9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.
>
> "10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

And it will not be amiss to note that under this rule the Railroad Administration reserved to itself, through its proper Department, the right to assign cars,—an obviously wise provision to care for any situation that might have arisen because of failure of the Fuel Administration adequately to function respecting the distribution of railroad fuel or any other coal.

All that was done by the Interstate Commerce Commission in its emergency direction of April 15, 1920, was to reinstate the railroad fuel car in the rule, and thus to re-establish the old rule *in toto.* The Car Service Sec-

tion of the Railroad Administration was then no longer existent,—manifestly it could not function under war time Rule 8. The Fuel Administration had also long before ceased its labors,—it was equally manifest that it could not longer protect railroad fuel necessities. The natual course was the re-establishment of the pre-war status. The Commission re-established it, directing the observance of the new Rule 8 by all carriers in these words (Rec. 24, 42, and 49):

> "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.,* vs. *H. V. Ry. Co.,* 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co., et al.,* 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

The outstanding point in all these cases and the rule of car distribution which was evolved from these cases is that there is no inconsistency whatever in counting the cars against the mine and simultaneously placing assigned or consigned cars at the mine in excess of the distributive share. Beyond any possibility of doubt, the cases do not warrant the theory that the mere counting of the cars against the mine excludes the idea of assigning cars. Such a theory is utterly destroyed by the fact that the Commission, in the *Hocking Valley, Traer,* and other cases, *supra,* over and over again permitted the assigning of cars while at the same time it directed that all cars placed must be counted.

Not only is there no dictionary meaning of the word "count" which justifies the position of the plaintiff, but there is, as has been shown, a customary and accepted understanding of that word in the regulation of inter-

state commerce, particularly car service, by the Interstate Commerce Commission that expressly negatives the meaning attributed to the word by the appellant. Over and over again the Commission in these assigned car cases, has declared that each and every car must be counted against the mine, but simultaneously, in the same decisions the Commission has made it clear that the consigned and assigned cars, whether for company fuel, for foreign railway fuel, or privately owned or leased, must be placed in accordance with the consignment or assignment, even though in excess of the distributive share of the mine to which such cars were consigned or assigned.

The view held by the District Court of the Northern District of Alabama, Southern Division, in *Corona Coal Co.* v. *Southern Ry. Co.*, 266 Fed. Rep. 726, in adjudicating a controversy very similar to this, seems correct. There, in speaking of assigned cars for railroad fuel, the Court said, at page 727:

> "It is established—indeed, it is not controverted—that such cars are counted against the distributive share of the mines to which assigned, and that such mines are not given a share of the cars available for ordinary commercial shipments, unless, and to the extent only, that the assigned cars fail to equal the distributive share of these mines, which receive the assigned cars."

Respecting the connection between the assigned car rule of the Commission and paragraph 12, the Court, at page 729, said:

> "Prior to the amendment of the Interstate Commerce Law by the insertion in paragraph 12 of the words 'and to count each and every car furnished to or used by any such mine for transportation of

coal against the mine,' this rule, now statutory, had been by order of the Interstate Commerce Commission a rule of long standing for the government of railroads, and it had been often sanctioned by the courts in adjudicated cases. So it can be said that this approved rule, in effect already law, was by the Transportation Act of 1920 merely crystallized into statutory form."

And, again on this same subject at page 732, is the language:

"The origin and history of the phrase 'apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines for the transportation of coal against the mines,' shows the reason for its adoption by the Commission and its incorporation afterwards into the statute. Congress knew that at one time assigned cars were not taken into account in the distribution by the carriers to mines served by them, and that the mines receiving assigned cars were given the same pro rata share of the ordinary commercial cars as were given to the mines that received no assigned cars, and that the assigned cars were not counted against the mines favored with them. In the Hocking Valley Case, 12 Interst. Com. R 398, and in Traer Case, 13 Interst. Com. R. 451, this practice was complained of and held to be unjust and not to be allowed. When this question came before the Supreme Court of the United States, the decision was upheld in I. C. C. v. C. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. It is well to read the opinion in the Traer Case, rendered by Commissioner Clark, now Chairman of the Interstate Commerce Commission. It may be ventured that Congress did not intend to change the meaning of the phrase 'count against the mine' or to enlarge the scope

> of the rule which is referred to in the Ill. C. R. R. Co. Case, supra, and the Morrisdale Coal Co. Case, supra."

Beyond this the District Court in this same case very naturally took the position that—(p. 733)

> ". . . if the plaintiff's interpretation of Paragraph 12 should be followed it would be to read into the statute a provision which it does not contain and which it seems clear that Congress failed or refused to write there or elsewhere as a part of the Act. It would have been a very easy matter, if Congress had adopted plaintiff's view, to have added to Paragraph 12 words of this purport:
>
> 'There shall be distributed to the mines their proportionate number of cars according to mine ratings, whether or not the cars or any of them be assigned cars.'
>
> Congress did not adopt such idea, and for the courts to adopt it would be to add to the statute, and would, in effect, also greatly tend to destroy the power and usefulness of the Interstate Commerce Commission in time of distress and car shortage, and cause confusion in the distribution of cars in the mining districts."

It should be borne in mind that while this controversy and while the controversy in *Corona Coal Co.* v. *Southern Ry. Co. supra.* was one respecting assigned cars for railroad fuel loading, the statute makes no distinction, nor does the rule of the carriers under attack, make any distinction between railroad cars assigned for railroad fuel loading and privately owned cars assigned for the owner's loading. What was said by the District Judge with respect to the probable course of Congress, had that body really intended to abolish the right of a carrier to assign cars for its own or a foreign railway's

fuel coal loading, applies *a fortiori* to the assigned privately owned car. Certainly, Congress would not have taken away the right of the private car owner to the utilization of his own cars from day to day to the fullest extent available regardless of the distributive share of carrier owned cars which might accrue to competing mines, by the employment of such language as is contained in paragraph 12.

Moreover, a close reading of Paragraph 15 of Section 1 and a comparison of Paragraph 12 therewith, throws further and clearer light upon the real intent of Congress on this general car question. In Paragraph 15, which confers upon the Commission certain powers over car service during emergency periods, it will be observed that that power, so far as relates to the handling of locomotives, cars, and other vehicles during the emergency, is expressly limited by subdivision (b) (see *ante*, p. 5) to control over *railroad owned* equipment. The limitation is accomplished by the insertion of the three words, "as between carriers," and expressly denies to the Commission the power even in time of emergency, to disregard the private rights of the private car owner in his own equipment. It is inconceivable that Congress legislating for the effective control of railroad equipment during periods of emergency would have expressly saved to himself the rights of the private car owner in his own car in paragraph 15, if just previously, in paragraph 12, those rights had been taken away from the private coal car owner during ordinary times with no particular emergency existent.

Not only this, but paragraph 15 refers to all cars, while paragraph 12 refers only to cars for coal loading. If the contention of the plaintiff is sound, it necessarily follows that Congress has discriminated between private

cars for coal loading and all other private cars, saving to the owners of the latter all of their rights, even in time of emergency, and denying to the owner of the private coal car at all times all of his rights in his own equipment. This would be class legislation with a vengeance.

Another point to be borne in mind is that had Congress intended the abolishment of the rights of the private coal car owner in the use of his own equipment, it most certainly should and would have provided compensation for such taking of private property. This was certainly not done in paragraph 12, nor is there any direct reference to such provision for compensation in paragraph 14 of Section 1, wherein the Commission is generally empowered to fix the compensation for car service between using carriers and the owners of the equipment. The point to be noted with respect to paragraph 14 is that the compensation authorized to be established by the Commission is that to be paid for the use of equipment "not owned by the carrier using it." This is not by any means a provision intended to compensate for an absolute taking of the private car from the owner. Should the right of the private car owner to the use of his own equipment be taken from him, he most certainly could not be expected to continue the ownership of such equipment, yet the statute provides no compensation for him except that for its use by a carrier not the owner.

Again, on this same point, as will be later shown, Congress expressly rejected language which clearly was intended to abolish the right of the private car owner to the use of his own car as accorded to him under the assigned car rule of the Interstate Commerce Commission. (*post*, pp. 36 and 42.)

Attention should also be paid to the fact that the rule laid down in paragraph 12 governs only the distribution of cars to mines. But coal is loaded elsewhere than at mines, and this is true of railroad fuel coal. The appellant's interpretation of paragraph 12 would deny the protection of adequate car supply for railroad fuel coal loaded at mines, but would not touch the right to assign cars for railroad fuel coal loading at coastwise, lake, or river docks, or at storage bins. The truth of the situation is that the Commission's assigned car rule is a rule for mine loading, as will appear from the cases cited, and as such was enacted into statute law.

But if it be admitted that the language of paragraph 12 of Section 1 is ambiguous and leaves the legislative intent in doubt, then it is proper to search the legislative history in order to determine, if there possible, just what the evil was which the Congress intended to cure. *Church of the Holy Trinity* vs. *U. S.* 143, *U. S.* 457.

The Legislative History of Paragraph 12 *clearly shows it is intended as a Statutory Enactment of the Commission's Assigned Car Rule.* The legislative history of the Transportation Act, 1920, is found in the records of the 66th Congress. It shows that the original Senate Bill, including the amendments agreed to by the Senate, was known as "S. 3288," and was entitled "A Bill Further to Regulate Commerce among the states and with foreign nations and to amend an Act entitled An Act to Regulate Commerce, approved February 4, 1887, as amended," Section 34, page 76, provided as follows:

> "It shall further be the duty of every carrier, by railroad subject to this Act, serving coal mines located upon its line or lines to make just, reasonable, and non-discriminatory distribution among

such mines of all cars available for the transportation of coal during any period (hereinafter called a car-shortage period) when the carrier's supply of cars for such service does not equal the requirements of such mines. To that end, every carrier shall make and establish rules and regulations providing for the rating of such mines and, during car-shortage periods, the distribution of cars among them in proportion to such ratings. The rules and regulations so established shall provide, among other things, that each and every car furnished or used for the transportation of coal during a car-shortage period shall be counted against the proportionate distributive share of the mine receiving or using it, and that no car shall be furnished to or used by any mine for the transportation of coal during a car-shortage period in excess of the proportionate distributive share of such mine, regardless, in either case, of who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or the ownership of such car or cars. It shall be unlawful for any such carrier, by any rule, regulation, or practice, either directly or indirectly, to fail or refuse to count against the proportionate distributive share of any mine, any car or cars furnished to or used by such mine for the transportation of coal during a car-shortage period, or to furnish to any mine for the transportation of coal during a car-shortage period any car or cars in excess of the proportionate distributive share of such mine, regardless, in either case, of who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or of the ownership of the car or cars. The proportionate

distribution required by this paragraph shall be accomplished during successive fourteen day periods which may be designated from time to time by the carrier; Provided, That in the event the Board finds that it is necessary in order to furnish transportation companies with coal to be used in the movement of trains, cars to be loaded with coal to be used for fuel in the movement of trains may be omitted in the said count to the extent, and only to the extent, prescribed by the order of the board. . . . ."

That this bill, with the exception of the last provision, which was to give to the proposed Transportation Board the power to allow the carriers to use cars for railway fuel in any number, was the bill which the National Coal Association was strongly advocating is shown by letter submitted by Mr. J. D. A. Morrow, Vice-President, National Coal Association, dated September 4, 1919, reproduced on page 2170 of the record hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, R. R. 4378. This letter reads as follows:

"National Coal Association,
Washington, D. C., September 4, 1919.

Hon. John J. Esch,
House of Representatives, Washington, D. C.

My dear Mr. Esch:

After submitting the proposed amendments of the Esch-Pomerene bill H. R. 4378, to the House Interstate Commerce Committee on August 28, the National Coal Association, in conference with its general counsel, gave further consideration to the third amendment as submitted and came to the conclusion that it was defective in the following

respect. It was subject to the construction that the carrier must equalize the distribution of cars every day during a car-shortage period which would in certain cases be a practical impossibility. We, therefore, prepared a new draft of this amendment, substituting for the phrase 'on any day or days on which there is a car-shortage on its line' the phrase 'during a car-shortage period;—and adding the following provision: 'The proportionate distribution required by this paragraph shall be accomplished during successive 14-day periods which may be designated from time to time by the carriers.'

Our amendments as originally proposed have been in substance embodied in the Cummins bill, S. 2906, and we have today conferred with Senator Cummins respecting the changes in the third amendment just referred to. Those changes are satisfactory to the Senator and we understand from him will be inserted in the Senate Bill. The amendments will then be satisfactory to us and we desire to urge your committee to incorporate them in the House bill.

For convenient reference the amendments now embodied in the Senate bill No. 2906 (introduced by Senator Cummins) will be found at the following places:

First amendment, page 49, lines 21 to 23.
Second amendment, omitted.
Third amendment, from 52, line 12, to page 54, line 5.
Fourth amendment, page 61, lines 4 and 7.
Fifth amendment, omitted.

If these amendments meet with your approval it does not appear to us to be necessary to have a hearing before your committee, unless the other members desire some information. In that case, we will be glad to appear at any time you may

designate, and in any event, I have asked Mr. John Callahan, our traffic manager, to call on you in regard to the matter.

Very truly yours,
J. D. A. MORROW, Vice-President,
National Coal Association."

And the third suggested amendment (which deals with car distribution) referred to by Mr. Morrow, reads, word for word, the same as Section 34 of the Senate Bill as just set forth save for the last provision, giving power to the Transportation Board to assign railway fuel cars, which quite naturally is omitted from the amendment suggested by the National Coal Association.

At this time the House Bill No. 4378 was under consideration, and contained the following provision:

> Section 402—"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. . . . ."

The National Coal Association was endeavoring to have its third suggested amendment substituted for this Section 402.

The substituted amendment was presented to the House by Mr. Loos, one of counsel, National Coal Association. See pages 2172 to 2191,—Hearings before the

Committee on Interstate and Foreign Commerce of the House of Representatives, H. R. 4378. The National Coal Association had accomplished its purpose in the Senate in its attempt to deprive the railroads of all right to use their coal cars for the carriage of their fuel coal and to deprive the private car owners of the right to use their own cars, the theory of its proposed amendment being to require the absolutely pro rata distribution of all cars based on mine ratings. But even here, a proviso had been inserted by the Senate Committee as already shown (*ante,* p. 37), which would have permitted the Transportation Board to have deviated from the strict rule of the proposed statute so as to protect railroad fuel coal.

The House Committee called Mr. E. E. Clark, Chairman of the Interstate Commerce Commission, before it to furnish information with respect to the amendments proposed by the National Coal Association. Mr. Clark's statement from pages 2926 and 2927 of the record of hearings before the House Committee on Interstate and Foreign Commerce, H. R. 4378, follows:

> "The Chairman. Mr. Clark are you familiar with the provision inserted in the Cummins bill with reference to coal car distribution? They have a section devoted to it.
>
> Mr. Clark. I remember there is such a section, but at the instant I do not recall the particular provision.
>
> The Chairman. It seeks to carry into the law the orders of the director general now with reference to car distribution.
>
> Mr. Clark. That leads me to say that in the earlier days of the Railroad Administration this

very question of refraining from counting against the distributive share of the mine the cars that were sent for the carriers' own fuel supply came up. Some members of the director general's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. My understanding is that the rule adopted was based upon the principles laid down by us, and that they are following the practice of counting those cars against the distributive shares of the mines.

The Chairman. You will be in favor of legislation of that kind being incorporated in any bill, so as to make it a statutory matter and not really a matter of regulation.

Mr. Clark. I can see no objection to it, although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The Chairman. The idea expressed by the representative of the coal association was that when federal control ended there might be a recurrence to the old practice.

Mr. Clark. Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I can not see any possible objection to carrying it into the statute."

See also in this same connection, *Assignment of Freight Cars*, 57 I. C. C. 760.

The House Committee refused to adopt the National Coal Association's amendment and the House bill, H. R. 10453 as passed contained in Section 402, paragraph (12)

as heretofore quoted, *ante*, p. 39, that is to say, it contained the rule which provided that each and every car furnished to or used by any mine for transportation of coal must be counted against the mine, *and it did not contain the provisions of the National Coal Association amendment, which, after requiring the counting of all cars, provided that "no cars shall be furnished to or used by any mine for the transportation of coal in excess of the pro rata distributive share of such mine, regardless, in either case, of who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded to or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or of the ownership of such car or cars."* (*ante*, p. 36.) The fact that this amendment originally suggested by the National Coal Association was omitted from the Act, as finally reported to both houses and passed is not only significant, but conclusive against the contention of the plaintiff, *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184 at 198-199.

The Chairman of the House Committee on Interstate and Foreign Commerce in Report No. 456, page 17, to the House of Representatives on Bill H. R. 10453, advised the House as follows:

"CAR SERVICE

"Section 402 amends the car service act of May 29, 1917, in several particulars. Originally the term 'car service' included 'the movement, distribution, exchange, interchange, and return of cars used in the transportation of property.' As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include 'the supply, movement, and

operation of trains by any carrier by railroad subject to this act,' and so require every carrier by railroad 'to furnish safe and adequate car service.' In a recent decision of the Supreme Court of the United States it was held that under the commerce act the commission does not have the authority to order a common carrier to supply itself with certain cars. The pending bill gives the commission such authority. The same section makes it the duty of every common carrier, or railroad 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.' During Federal ntrol such a rule has been followed by ne Direc. n General and the committee follow decisions of the Interstate Commerce Commission and the present practice and has put in form of law what has been enunciated as proper practice."

See also *Assignment of Freight Cars, supra.*

The Senate bill containing the National Coal Association amendment and the House bill which did not contain the National Coal Association amendment went to conference. The conferees rejected the provisions of the Senate bill and retained the provisions of the House bill. The Conference Committee's Report, No. 650, page 61, to the House, with respect to Car Service—Coal Cars—includes the following:

"Section 402 of the House Bill required carriers

> by rail to make just and reasonable distribution of cars for the transportation of coal among coal mines served by them, and, in time of car shortage, to maintain and apply just and reasonable ratings of such mines and to count against each mine every car furnished to it. Section 34 of the Senate amendment required carriers by rail, during any period of car shortage, to make just, reasonable, and non-discriminatory distribution of cars to coal mines, to establish regulations providing for rating such mines and the distribution of cars among them, to count against each mine every car furnished to it, and not to furnish cars in excess of such ratings, and exception being made in the case of cars used for coal necessary for the movement of trains. The provisions of the House bill were agreed to, and are contained in Section 402 of the conference bill."

Manifestly the conference committee recognized the precise difference in the two bills in this respect. The Senate draft in precise language required a distribution between mines which should be absolutely and evenly balanced on the basis of mine rated capacity. The obligation thus proposed to be laid on the carrier that it should furnish no cars to any mine in excess of the proportionate distributive share so ascertained made this requirement explicitly, without regard to "who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended or of the ownership of such car or cars." The language suggested as already said by the National Coal Association (*ante*, p. 37), may be said to have sought to make assurance doubly sure twice. Nothing whatever of this nature was included in the House draft. It re-

quired only a just and reasonable distribution, the maintenance of just and reasonable mine ratings, and the counting of each and every car furnished against the mine. The conference committee rejected the Senate draft *in toto*. It accepted the House draft, and the latter is now paragraph 12 of Section 1. It is plain that when Congress in Section 402 of the Transportation Act 1920, amended Section 1 of the Act to Regulate Commerce by the inclusion of paragraph (12) it merely enacted into statute law the administrative rule of car distribution laid down in the *Hocking Valley* and *Traer* cases, *supra,* approved by the Supreme Court of the United States in the *Illinois Central* case, *supra,* and universally in force throughout the United States for many years. There can be no gainsaying the fact that Congress deliberately rejected the interpretation which the National Coal Association attempted, through its amendment, to have placed upon the words, "counted against the mines," and instead, enacted into law the interpretation placed upon those words by the Interstate Commerce Commission and the Supreme Court of the United States, and by common usage.

Clearly, on this showing of the statute itself, and of the record of its making, there would seem to be no room for doubt that paragraph 12 of Section 1 of the Interstate Commerce Act is a statutory enactment and no more and no less, of the rule laid down by the Interstate Commerce Commission in the *Traer* and *Hocking Valley* cases, *supra,* and sustained by this Court in the *Illinois Central* and *Chicago & Alton* cases, *supra.* And this is precisely the view adopted by the Interstate Commerce Commission in answering the Senate's inquiry on the subject, for it said (Rec. 193) in *Assignment of Freight Cars, supra,* at page 766:—

"The Commission is of the opinion that para-

graph 12 of section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley* and *Traer* Cases, *supra*. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States."

The Commission's practical interpretation of the statute given by it as the administrative body charged with its enforcement is entitled to great weight. *B. & M. Rd.* v. *Hooker*, 233 U. S. 97. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361 at 401-402.

The Commodities Clause is a factor in this Controversy.—It will be well to add, here, that the commodities clause, now embodied in paragraph 8 of Section 1 of the Interstate Commerce Act, expressly exempts from its operation coal produced solely for the railroad's common carrier use, in its owned or leased and operated mines. It is inconceivable that Congress should, under paragraph 12 as appellant contends it to mean, deny to the railroads operating mines producing their own fuel coal the very benefits already secured to them by the commodities clause. For manifestly those benefits are of little value if they cannot be protected by car supply in times of car shortage, and in addition cannot be utilized in commercial markets at any time.

The Transportation of Railroad Fuel Coal is private service, not commerce.—Another point which may also be briefly referred to is the character of the service performed by these railroads in transporting their fuel coal. It has frequently been held that where a Railway Company transports its own company materials over its own

line of railroad, it merely performs for itself a purely private service and is not enaged in interstate commerce within the meaning of the Interstate Commerce Act. *Santa Fe R. Co.* v. *Grant Bros.*, 228 U. S. 177. The same principle has been upheld with respect to the transportation of oil by pipe line. *U. S. v. Ohio Oil Co.*, 234 U. S. 548. In the *former case* the Supreme Court sustained the ruling of the Commission in the matter of *Railroad–Telegraph Contracts*, 12 I. C. C. 10, where the Commission laid down the principle that where a common carrier transports its contractor's labor and material used in the construction or maintenance of its railroad it may do so without regard to the provisions of the Interstate Commerce Act. Seemingly this must be so *a fortiori* where the railroad hauls its own company material and not the material of its contractor.

In the *latter case* the oil companies, save the Uncle Sam Company, obtained a monopoly through their ownership of pipe lines, the independent producers being compelled to sell their oil to the pipe line company, which as the only available transporter, was the only market for such independent production. The Hepburn Amendment to the Act to Regulate Commerce made pipe lines transporting oil in interstate commerce common carriers. The Supreme Court held that in the peculiar circumstances of the situation they were common carriers and could no longer monopolize the oil market through the control of pipe lines and thereafter must transport as common carriers such oil production of independent producers as might be offered. The Uncle Sam Company, however, had purchased no oil from independent producers. It produced all its oil, and ran that alone and no other oil through its own pipe line to its own refinery. This Court held that in so transporting through its own pipe line all its own

oil produced by it the Uncle Sam Company was performing merely a private service and not the service of a common carrier under the provisions of the Hepburn Act, and that the provisions of the Interstate Commerce Act were not applicable to the transportation of its own oil through its own pipe lines.

The rate provisions of the Interstate Commerce Act have no greater legal sanctity than have the service provisions of that Act. It would seem, therefore, to follow that where a carrier transports its own company material or railroad property, it is not engaged in interstate commerce within the meaning of the Interstate Commerce Act, but is performing for itself a purely private transportation service, not amenable to that regulation which governs interstate commerce. Surely this would be particularly true with respect to coal produced in the carrier's owned or leased and operated lines, and hardly less so respecting the coal from a mine of which the entire output had been sold to a railroad.

3. Under paragraph (15) Sub-divisions (a) and (b) of Section 1 of the Interstate Commerce Act the Commission may, when the emergency condition specified in the Act is found, in its opinion to exist, suspend the operation of the car distribution rules and regulations established pursuant to paragraph (12) of the same section.

On this point the decision of the Judges of the Fourth Circuit says (Rec. p. 128):

"The authority given to the Commission by (a) subdivision 15 in cases of emergency 'to suspend the operation of any or all rules, regulations or practices then established with respect to car service' does not extend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations and practices

> mean the rules, regulations and practices adopted by the Commission or by the railroads in conformity to the act or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute. If therefore the order of the Commission has no other basis than the authority conferred to suspend rules, regulations and practices it would be without support. *Morrill* v. *Jones,* 106 U. S. 466; *United States* v. *United Verde Copper Company,* 196 U. S. 207; *Williamson* v. *United States,* 207 U. S. 425; *United States* v. *Grimaud,* 220 U. S. 506."

These cases, relied upon by the court below to support its view, are not strictly in point here. In each instance there was involved the validity of certain permanent regulations issued by government departments in furtherance of administrative functions conferred upon them by Congressional delegation to give effect to general statutes. There was not, as is the case here, anything analogous to temporarily setting aside, because of an emergency, a carrier's rules established in compliance with a statutory obligation the maintenance of which may be incompatible with the intent of Congress respecting how the emergency should be met.

But however this may be, it is admitted that the language of paragraph 15, sub-divisions (a) and (b) is not apt to justify an out-and-out suspension of paragraph 12 of Section 1 of the statute, for as the court below well points out, those sub-divisions go only to the suspension of car service rules, regulations or practices. The same distinction is a second time made by the court (Rec. 130). The difficulty is that the court finds itself unable to justify the Commission's emergency order and direction of

April 15, 1920, suspending existing car distribution rules and directing the establishment of emergency rules in lieu thereof, under these two particular sub-divisions.

To be sure, the Circuit Court of Appeals did find within the priority provisions of sub-division (d) of paragraph (15) other language under which it could and did justify the Interstate Commerce Commission's emergency direction issued April 15, 1920. On this point the Court said (Rec. p. 129):

> "We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that 'whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority . . . (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.'"

The necessity for going to this extent is not apparent. Congress has defined the term "car service" to include, among other things, the "distribution" of cars, and seemingly the *suspension* of car distribution rules is therefore specifically contemplated in sub-division (a) of paragraph (15) reading: ". . . to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission." Likewise, the *establishment* of emergency car distribution directions is specifically contemplated in sub-division (b). That the Commission is in accord with this interpretation of paragraph

(15) clearly appears from its answer to the United States Senate respecting its assigned car order of April 15, 1920 (Rec. p. 103). Note that in this connection, before announcing that the direction of April 15, 1920, was issued under the authority of paragraph (15) the Commission recites merely the power therein given to suspend existing car service rules and establish emergency car service directions, these being sub-divisions (a) and (b). No reference is made by the Commission to the priority provisions of that particular paragraph, established in subdivision (d).

The soundness of this view is further demonstrated by an analysis of the car service amendments to Section 1 of the Act to Regulate Commerce in May, 1917. The emergency authority then conferred upon the Commission extended only to the suspension of existing car service rules, and the establishment in lieu thereof of emergency car service directions. No power was incorporated in the statute authorizing the Commission to effect priority of transportation. Those amendments also included what is now paragraph (11) of Section 1 of the Interstate Commerce Act, obligating the carrier to effect just and reasonable distribution of cars to all shippers. If the view of the Court below, that the Commission's action can only be sustained under sub-division (d) of paragraph 15, is to govern, it necessarily follows that in 1917, when the Commission possessed no priority powers, but only the power to suspend car service rules and substitute car service directions, it had no means of meeting a car service emergency. This, it is admitted, would be a rather violent assumption in view of the great endeavors hastily made by Congress through the car service amendments to the Interstate Commerce Act to meet the very pressing

transportation situation which had then for some time existed incident to our preparation for entrance into the world war.

There are words and phrases in the nomenclature of American railroading and of the regulation of interstate commerce which are a bit vague as to meaning. But the phrase "car distribution" is not in that class. The veriest tyro in the business knows that car distribution expresses a relation between carrier and shipper, — expresses the service of furnishing cars on the part of the carrier and to the shipper. That the carriers so understand the phrase is apparent from their description of their own rules to govern this relation with coal mines as "Rules for Rating for Car Distribution Purposes . . .." That the appellant and other coal shippers so understand the phrase is apparent by the constant use of it in exactly this meaning throughout the bill of complaint (Rec. pp. 8, 9, 10, 11) and from the affidavits of other shippers that they have read and understand that bill of complaint. That the Interstate Commerce Commission so understands the phrase is clearly shown in all its reports, many herein already cited, on questions of car relation between carriers and shippers. Indeed it can hardly be conceived that any one would seriously contend to the contrary, or that Congress had not intended that car distribution between carriers and shippers ~~to be outside~~ should be within the pale of the service provisions of the Act. For that matter, all that there is to paragraph 12, Section 1, is a provision respecting car distribution by carriers to coal mines.

It is well to keep in mind that whereas paragraph (12) of Section 1 calls for just and reasonable rules for distributing cars to coal mines, the preceding paragraph (11) makes the same call with respect to all car distribution.

There is not in paragraph 11, any more than in paragraph 12, any express proviso suspending its operation, or suspending rules established thereunder during the effectiveness of emergency directions as to car service issued by the Interstate Commerce Commission under paragraph 15 of Section 1. It was argued in the Court below and will no doubt be pressed again, that as paragraph 12 contains no proviso suspending its operation when the emergency powers of paragraph 15 are exercised, it stands for all time and under all circumstances unaffected by paragraph 15 or anything done in pursuance thereof. It may with equal propriety be argued that as paragraph 15 applies to "all rules, regulations, or practices, then established with respect to car service," and as Congress embodied no proviso therein specifically exempting from its operation rules established pursuant to paragraph 12, then such latter are necessarily included within the broad language of paragraph 15.

But even this argument is unnecessary. The so-called car service provisions of Section 1 of the Interstate Commerce Act first became law in what was known as the Esch-Pomerene bill, Public—No. 19—65th Congress, approved May 29, 1917, the official title being:—

> An Act to amend an Act entitled "An Act to regulate commerce," as amended, in respect to car service, and for other purposes.

Observe that it was specifically "in respect to car service," and examination will show that it made routine provisions and followed them by a general emergency provision. When the amendments in the shape of the Transportation Act, 1920, were passed, Congress followed the same course. It elaborated somewhat the orig-

inal routine car service provisions and inserted a new one in the paragraph numbered 12 here in controversy, but again it followed all these routine provisions with the general emergency provision, also somewhat elaborated. Undoubtedly had Congress desired, it could have closed all these routine paragraphs with a semi-colon, followed by the words, "provided, however, that," and these in each case followed by the language of paragraph 15, and this may possibly have foreclosed some argument by this appellant. But quite naturally Congress did no such inane thing. It had originally enacted a car service bill complete in itself, with routine and emergency provisions inter-related and inter-dependent. In the Transportation Act, 1920, it did the same thing, with the result that each routine provision is subject in the whole to the final emergency provision in paragraph 15.

It would be strange indeed if Congress, enacting a complete scheme of service regulation intended as it clearly is to cope with all transportation emergencies, should have simultaneously expressly declared that a hard and fast aand invariable rule must govern at all times and under all circumstances in the distribution of cars for the loading of one of our basic commodities,—coal. In the light of our nation's experience with that commodity in the several years just past, including the war period, this would be almost ironical.

The doctrine laid down by this Court in *Field* v. *Clark*, 143 U. S. 649, is ample authority for the proposition that the power conferred upon the Commission by paragraph 15 of Section 1 to suspend car distribution rules, including those established pursuant to paragraph 12, is a perfectly valid delegation of administrative power. In that case, a revenue law provided exemption of certain import commodities from duties, as a reciprocal trade policy. But

the law left it to the President to judge whether the commercial regulations of the exporting countries were reciprocally equal and reasonable, or the contrary, and provided that when he determined the latter to be the case he should by proclamation suspend the exemption from duty, whereupon certain prescribed duties should be levied. This Court said at page 693:

> "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

So far as the nature of the problems which Congress foresaw and with which it has endeavored to cope in con-

ferring this emergency jurisdiction upon the Commission would permit, Congress in paragraph 15 has legislated as it did in the statute involved in *Field* v. *Clark, supra.* Where the President was there to ascertain the existence of a particular fact, the Commission is here to ascertain the existence of the emergency requiring *immediate* action. Observe the word *immediate,* implying the necessity for something to be done at once and without delay. Where the President was *required* to suspend the exemption statute, the Commission is here *authorized* to suspend existing rules, and the distinction obviously recognizes that administrative leeway is required in meeting transportation emergencies, just as in the routine regulation of commerce in normal times. Again, where the revenue law prescribed the duties which were to be effective during the suspension of the exemption, the law here limits the promulgation of emergency rules to such as "will best promote the service in the interest of the public and the commerce of the people,"—obviously a definite command to the administrative agency which clearly limits the extent to which it may go in meeting the emergency. Similar language is used as a definite command in routine regulation in other Sections of the Act.

It must be remembered that those portions of the Interstate Commerce Act with which we are here concerned deal with service. Service, unlike rates, is not a matter of mathematical precision and accuracy, and its immediate necessities cannot be foreseen in detail and be so provided for by statutory enactment. "The flexible limit of judgment which belongs to the power to fix rates," recognized by this Court in *Atlantic Coast Line* v. *N. Car. Corp. Comn.,* 206 U. S. 1-26, is at least equally a necessity of service regulation and this must obviously be especially

so of Service regulation calculated to meet all emergencies. Surely if the great *desideratum* of railroad service is to be met during any and whatever transportation emergency which may arise, there must be flexibility of judgment possible, and this Congress has wisely and lawfully recognized. The point is that the emergency is something requiring regulation and not legislation, and that its immediate necessities would not, indeed, permit of the latter. Congress could, at the time the emergency arises, delegate its regulation to the existing administrative body. Manifestly it can do so in advance, and it has done so by authorizing the suspension of existing rules, and the establishment of emergency rules within certain definite limits.

It is therefore respectfully submitted that under subdivisions (a) and (b) of paragraph (15) the Interstate Commerce Commission during the emergency periods may suspend the operation of the rules and regulations respecting car service established in pursuance of the requirements of paragraph 12.

4. The Commission's car service direction of April 15, 1920, was a valid exercise of the authority vested in the Commission by paragraph (15) of Section 1 of the Interstate Commerce Act.

The Commission's car service direction of April 15, 1920, has been previously set out (*ante*, p. 6). Therein the Commission recites that it "is of opinion that an emergency exists requiring immediate action." It then proceeds to suspend the operation of the existing car service rules of the carriers respecting distribution of empty cars to coal mines for coal loading, and next directs the observance of substitute rules to govern such

distribution of empty cars to mines until the further direction or order of the Commission. The sequence of the order follows the sequence of authority conferred upon the Commission in sub-divisions (a) and (b) of paragraph (15).

The condition precedent to the exercise of this power limits its employment to "whenever the Commission is of opinion" that the emergency exists. The order of April 15 not only clearly expresses the opinion that an emergency requiring immediate action does exist, but furthermore defines the nature of the emergency. It states that "the supply of cars available for the transportation of coal continues insufficient to meet the demand" and adds that the cessation of government control of coal production and distribution makes the issue of the direction necessary in order to protect railroad fuel requirements without confiscation of commercial coal.

The Circuit Court of Appeals with respect to this exercise of this emergency power by the Commission is clearly correct in its statement that (Rec. p. 130):

> "The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised. *Interstate Com. Com.* v. *Ill. Cent. R. R.*, 215, U. S. 452, 478; *Texas and Pac. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426."

Were this all that the Circuit Court of Appeals said on this subject further discussion thereof would be futile. But the court went beyond the particular language quoted and indirectly defined an emergency as a car shortage

which, in the opinion of the Commission, "was so much beyond the usual as to constitute an emergency." It is respectfully submitted that in this language the Circuit Court of Appeals went too far and that these words should not be permitted to stand as a qualification of the paragraph just quoted. Clearly, on the cases cited by the Circuit Court of Appeals itself, it is for the administrative body, and not for the court, to define what constitutes the emergency. *Interstate Com. Com.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478; *Texas & Pac. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. It may well be, in the vicissitudes of transportation throughout the great United States that something considerably less extensive in its total result that the ordinary long continued car shortage may create an emergency requiring immediate action.

In closing, therefore, it is respectfully submitted that the Court should find, first, that the injunction order of the United States District Court for the Northern District of West Virginia was improperly made, the cause being either within the jurisdiction of three judges only, or within the jurisdiction of the Interstate Commerce Commission; second, that paragraph (12) of Section 1 is a mere statutory enactment of the administrative rule laid down by the Interstate Commerce Commission in the *Traer* and *Hocking Valley* cases, *supra*, to govern distribution of empty cars to coal mines; third, that the authority conferred upon the Interstate Commerce Commission under pargraaph (15), sub-divisions (a) and (b) of Section 1 of the Interstate Act, expressly empowers the Commission during emergency periods to suspend the operation of car distribution rules, including those established in accordance with paragraph (12) of the same section; and, fourth, that the Commission's order and direc-

tion of April 15, 1920, was a valid exercise of the power conferred upon it in paragraph (15) of Section 1, and particularly of the exercise of the powers conferred in sub-divisions (a) and (b) of that section.

And for the reasons herein set forth we further submit that the appeal in this suit should be dismissed.

Respectfully submitted,

HUGH L. BOND, JR.,
R. V. FLETCHER,
W. S. BRONSON,
A. G. GUTHEIM,
Solicitors for Appellee.